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23
24 UNITED STATES DISTRICT COURT
25 CENTRAL DISTRICT OF CALIFORNIA

26 JOHN SIMON, KARL SIMONSEN and
27 CHRISTOPHER JACOBS, on behalf of }
28 themselves and all persons similarly
situated,

29 Plaintiffs,

30 vs.

31 AT&T MOBILITY, LLC, a Delaware
32 limited liability company conducting
33 business in the State of California, and
34 Does 1 to 10.

35 Defendants.

36 CV 10 0791
37 CASE NO.

38 **COMPLAINT FOR:**

39 1. **BREACH OF CONTRACT and**
40 2. **VIOLATION OF
41 CALIFORNIA B&P CODE
42 §17200**

43 **CLASS ACTION**

44 **DEMAND FOR A JURY TRIAL**

45
46 This class action is brought on behalf of AT&T MOBILITY, LLC ("AT&T")
47 customers who purchased internet access through AT&T. All allegations in this

48 CLERK US DISTRICT COURT
49 CENTRAL DISTRICT OF CALIF.
50 LOS ANGELES

51 2010 FEB - 3 PM 2:37

52 FILED

53 MMM (JEMx)

1 Complaint are based upon information and belief except for those allegations
2 which pertain to the Plaintiffs named herein, JOHN SIMON ("SIMON"), KARL
3 SIMONSEN ("SIMONSEN") and CHRISTOPHER JACOBS ("JACOBS")
4 (collectively hereinafter "PLAINTIFFS"), and their counsel. Each allegation in
5 this Complaint either has evidentiary support or is likely to have evidentiary
6 support after a reasonable opportunity for further investigation and discovery.

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PRELIMINARY STATEMENT

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10 1. This is an action for unlawful collection of taxes/fees for internet
11 access and the recovery of damages brought by Plaintiffs on behalf of themselves
12 and other similarly situated consumers of the Defendant in California.

13 2. Plaintiffs allege that the unlawful collection of taxes/fees for internet
14 access at issue arose out of a policy and practice of Defendant's applicable to other,
15 similarly situated consumers. Plaintiffs seek money damages to redress these
16 violations of law.

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JURISDICTION

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20 3. This Court has jurisdiction over the subject matter of this action
21 pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1332
22 (diversity of citizenship).

23

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VENUE

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26 4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b). Venue
27 is proper in this Court because the injuries to one or more of the persons
28 complaining herein occurred in the County of Los Angeles, California.

PARTIES

5. Plaintiffs allege that at all material times mentioned herein, they are and were:

- (a) Individuals who currently reside in the State of California (SIMON in Long Beach, California, SIMONSEN in San Jose, California and JACOB in Los Angeles, California);
- (b) Individual customers of AT&T;
- (c) Charged tax on internet access; and
- (d) Are members of the CLASS as defined in this Complaint.

11 6. PLAINTIFFS are informed and believe, and allege upon information
12 and belief, that AT&T, at all times during the Class Period was:

- (a) A specialty retailer with its main office located in the State of Georgia and conducting business throughout the United States and in the County of Los Angeles in the State of California;
- (b) A seller of wireless data plans to consumers and businesses by contract on a monthly payment plan; and
- (c) Charged its customers taxes on internet access to all members of the CLASS.

20 7. PLAINTIFFS seek to bring their claims on behalf of all AT&T
21 customers, past and present, who contracted for internet access with Defendant and
22 were charged fees and/or taxes, including but not limited to a City Utilities Users
23 Tax, based upon the cost of internet access during the Claims Period” and will
24 further represent any such individuals who have additional timely claims arising
25 from taxes on internet access by Defendant.

REPRESENTATIVE CLASS ALLEGATIONS

8. This action is thus brought, and may properly be maintained, as a class action pursuant to Rule 23 of the F.R.C.P. Plaintiffs bring this action on behalf of themselves and on behalf of a Class of all others similarly situated who, within four (4) years prior to the date of filing of this action, entered into a contract with AT&T for the provision of internet access through a "smart phone" or a wireless data card.

9. The class is so numerous that joinder of all members is impracticable.

9 10. PLAINTIFFS are adequate representatives of the proposed
10 representative CLASS hereunder, because:

- (a) Their claims are typical of those of other persons in the represented CLASS;
- (b) They are represented by competent counsel with experience in related litigation; and
- (c) Defendant acted on grounds common to all members of the represented CLASS.

17 11. Alleged questions common to the CLASS are set forth in detail below.

18 12. Common questions of fact and law arise primarily from Defendant's
19 obligations under the Internet Tax Freedom Act (the "ITFA"). Those questions
20 include, but are not limited to:

- whether AT&T charged Plaintiff and the Class fees and taxes based upon the cost of internet access in violation of the Internet Tax Freedom Act;
- whether AT&T's actions violated California law;
- whether AT&T has been unjustly enriched by its retention of a portion of the tax;
- whether AT&T should be enjoined from collecting fees and taxes based upon the cost of internet access;

1 - whether AT&T should be required to seek a refund of the fees
2 and taxes paid in California and to return any refund to Plaintiffs
3 and the members of the Class.

4 13. There is little need for individual represented CLASS members to
5 individually control their claims as the issues are common to all persons and
6 involve common issues of fact and law.

7 14. No serious difficulties are anticipated in the administration of this
8 matter as a representative action.

9
10 **FACTS**
11

12 15. DEFENDANT sells wireless data plans to consumers and businesses
13 by contract on a monthly payment plan. The purchase of a wireless data plan
14 permits purchasers of the plan to obtain access to the internet remotely either on a
15 computer or on a so-called "smart phone" such as an iPhone, a Blackberry, or a
16 similar device.

17 16. AT&T's wireless data plans are sold to owners of "smart phones" or via
18 data cards. AT&T bills for internet access with a separate line item on the AT&T
19 monthly bill in varying amounts depending on the type of access contracted for.
20 Plaintiffs have such a plan and pay AT&T monthly.

21 17. In 1996 the United States Congress passed, and the President approved,
22 the Internet Tax Freedom Act (the "ITFA"). The ITFA, 47 U.S.C. § 151 (1998) as
23 amended, bars state and local government from imposing fees and taxes on internet
24 access. "No State or political subdivision thereof shall impose any of the following
25 taxes during the period beginning November 1, 2003, and ending November 1,
26 2014: ... (1) Taxes on Internet access."

27 18. Under the ITFA the phrase "internet access" means "a service that
28 enables users to connect to the Internet to access content, information, or other

1 services offered over the Internet; (B) includes the purchase, use or sale of
2 telecommunications by a provider of a service described in subparagraph (A) to the
3 extent such telecommunications are purchased, used or sold.-- (I) to provide such
4 service; or (ii) to otherwise enable users to access content, information or other
5 services offered over the Internet[.]”

6 19. Despite the prohibition on taxation of internet access enacted by the
7 ITFA, DEFENDANT charges its California customers fees and taxes, including a
8 City Utilities Users Tax, based upon, in part, the cost of internet access.

FIRST CAUSE OF ACTION

(Breach of Contract)

13 20. PLAINTIFFS incorporate by reference the preceding allegations of this
14 Complaint as though set forth here in their entirety.

15 21. AT&T and PLAINTIFFS entered into written contracts.

16 22. The written contracts were form contracts used by AT&T with all its
17 customers similarly situated to PLAINTIFFS.

18 23. The contracts between AT&T and PLAINTIFFS permit AT&T to
19 charge for its services including internet access on a monthly basis and permits
20 AT&T to charge PLAINTIFFS for all applicable and legally due federal, state and
21 local fees and/or taxes.

22 24. The contracts do not permit AT&T to charge for fees and taxes that
23 may not be calculated or billed based upon the cost of internet access.

24 Nevertheless, PLAINTIFFS have been required to pay these unlawful charges.

25 25. Despite the prohibition on state and local fees and taxes imposed by the
26 Internet Tax Freedom Act, AT&T charged PLAINTIFFS fees and/or taxes based
27 upon the cost of their internet access.

26. In doing the acts complained of herein, AT&T breached its contractual

1 obligations to PLAINTIFFS and the putative Class causing them damages in an
2 amount to be proven at the time of trial.

3

4 **SECOND CAUSE OF ACTION**

5 **(Violation of Business and Professions Code, §17200 *et seq.*,)**

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7 27. PLAINTIFFS incorporate by reference the preceding allegations of this
8 Complaint as though set forth here in their entirety.

9 28. By collecting charges that are unlawful, deceptive and/or unfair, as
10 alleged herein, AT&T violated Business and Professions Code § 17200, *et seq.*
11 causing actual injury to PLAINTIFFS and each member of the Class.

12

13 **PRAYER FOR RELIEF**

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15 WHEREFORE, PLAINTIFFS pray for judgment against each Defendant,
16 jointly and severally, as follows:

17

18 **ON THE FIRST CAUSE OF ACTION**

19 1. For money damages;
20 2. For attorney fees;
21 3. For prejudgment interest as allowed by law;
22 4. For costs of suit incurred herein; and
23 5. For such other relief as the Court deems just and proper.

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25 **ON THE SECOND CAUSE OF ACTION**

26 1. For disgorgement by Defendant of all amounts that have been obtained
27 in connection with any of the deceptive, unfair and/or unlawful
28 business practices alleged herein;

- 1 2. For restitution according to proof;
- 2 3. For attorney fees;
- 3 4. For prejudgment interest as allowed by law;
- 4 5. For costs of suit incurred herein; and
- 5 6. For such other relief as the Court deems just and proper.

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7 Dated: January 21, 2010

MORRIS AND ASSOCIATES

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by:


Stephen B. Morris
Attorney for Plaintiff

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Margaret M. Morrow and the assigned discovery Magistrate Judge is John E. McDermott.

The case number on all documents filed with the Court should read as follows:

CV10 - 791 MMM (JEMx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

=====
NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

Western Division
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

Southern Division
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

Eastern Division
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

Stephen B. Morris
 MORRIS AND ASSOCIATES
 444 West C Street, Ste 300
 San Diego, CA 92101
 Tel: (619) 239-1300

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

JOHN SIMON, KARL SIMONSEN and CHRISTOPHER JACOBS, on behalf of themselves and all persons similarly situated, v. AT&T MOBILITY, LLC, a Delaware limited liability company conducting business in the State of California, and Does 1 to 10,	PLAINTIFF(S)	CASE NUMBER
		CV10 0791 MMM (JEMx)
	DEFENDANT(S).	SUMMONS

TO: DEFENDANT(S): AT&T MOBILITY, LLC

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint amended complaint counterclaim cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Stephen Morris, whose address is 444 West C Street, Ste 300, San Diego, CA 92101. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

FEB - 3 2010

CHRISTOPHER POWERS

Dated: _____

By: _____

Deputy Clerk

(Seal of the Court)

SEAL

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3).]